

Department of Labor and Industry
Board of Personnel Appeals
PO Box 6518
Helena, MT 59604-6518
(406) 444-2718

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 4-2009

SUSAN MONTGOMERY)	
Complainant,)	
-vs-)	INVESTIGATIVE REPORT
)	AND
HELENA EDUCATION ASSOCIATION,)	NOTICE OF INTENT TO DISMISS
MEA-MFT)	
Defendant,)	
)	
HELENA PUBLIC SCHOOLS)	
Defendant.)	

* * * * *

I. Introduction

On October 7, 2008, Susan Montgomery, appearing pro se, filed an unfair labor practice charge with the Board of Personnel Appeals (BOPA or Board) alleging that her rights under the Collective Bargaining Act for Public Employees were violated by actions of the Defendants and their agents and representatives, several of whom were individually named in the complaint. No specific statutory violations were cited by Ms. Montgomery. The captioning in this matter will be explained later in this investigative report, but suffice to say, the Montana Education Association-Montana Federation of Teachers, hereafter MEA-MFT, has been served with notice of the complaint as have the Helena Education Association, MEA-MFT, hereafter HEA or Association, and the Helena School District, hereafter District. Richard Larson, attorney at law, responded on behalf of the labor side of the equation and Jeff Hindoien, attorney at law, responded from the management perspective.

John Andrew was assigned by the Board to investigate the charge.

II. Discussion

At the onset of this matter counsel for the defendants have responded denying that any unfair labor practice was committed either by the labor organizations involved, the school district, or any of the individuals named in the complaint.

1 Susan Montgomery was employed by the District as a Special Needs Teacher at
2 Helena High School for the school year 2007-2008. There is a collective bargaining
3 agreement, cba, between the District and the HEA. The HEA is affiliated with the MEA-
4 MFT. Regarding any and all of the individuals named in the complaint, they are either
5 management officials, HEA members and/or officials, or MEA-MFT employees and/or
6 officials. From what this investigator has ascertained none of the management officials
7 named in the complaint operated in any way outside the scope of their authority, nor is
8 there any authority cited by Ms. Montgomery as to why they should be individually
9 named as defendants or have any individual or personal liability for any of their actions.
10 Concerning the individuals named on the organized labor side of the complaint it is also
11 the case that none of these named individuals operated outside the usual scope of their
12 responsibilities. As such personal liability does not apply. See for instance, Williams v.
13 U.S. Postal Service, 834 F. Supp 350, 148 LRRM 2764, *aff'd sub nom Williams v. Letter*
14 Carriers, 35 F.3d 575 (10th Cir. 1994), *cert. denied*, 513 U.S. (1995), and Evangelista v.
15 Inland Boatmen's Union of the Pac. 777 F.2d 1390, 121 LRRM 2570 (9th Cir. 1985).
16
17

18 Thus, for purposes of this investigative report, and absent any reasoned showing to the
19 contrary, the correct defendants are the District and the HEA and any complaint against
20 the named individuals should be dismissed.
21

22 Quoting the language from her complaint form Ms. Montgomery alleges:
23

24 failure to represent/breach duties and responsibilities to represent me a union
25 member. JC Weingartner MEA attorney advised committee (which was
26 untrained) to end the grievance process based a (sic) statute then refused to
27 provide which statute. No citation. Union failed to protect my rights under the
28 negotiated agreement.
29
30

31 Ms. Montgomery goes on to allege:
32

33 Helena School District administration did not follow the Evaluation process nor
34 follow or respect the grievance process. Both the Union and the School District
35 failed to address complaint against (5) women in a protected class by Claudia
36 Morley. (age discrimination).
37
38

39 Her complaint further alleges that audio tapes of the Contract Maintenance Committee,
40 hereafter CMC or grievance committee, and JC Weingartner "reflect a hostile climate
41 which was biased in favor of the School District". Ms. Montgomery goes on to allege:
42

43 Colleen Hansen, a trained grievance representative filed Level One grievance
44 under protest after Greg Upham, principal missed the deadlines outlined in the
45 negotiated agreement. The other members of the contract committee denied the
46 grievance at Level Two rather than allowing it to proceed to Level Four. The
47 rules (sic) violated was a wanton disregard for the grievance process outlined in
48 the negotiated agreement.
49
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1 Also alleged in the complaint is a failure on the part of the Association and/or
2 Mr. Weingartner to provide information – statutory citations - requested by Ms.
3 Montgomery.
4

5 With the exception of the allegation of age discrimination, addressed separately below,
6 the Board of Personnel Appeals has jurisdiction over this matter. The Montana
7 Supreme Court has approved the practice of the Board of Personnel Appeals in using
8 Federal Court and National Labor Relations Board (NLRB) precedent as guidelines in
9 interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel.
10 Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103
11 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185
12 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of
13 Billings, Montana 555 P.2d 507, 93 LRRM 2753. To the extent previously cited, and as
14 might be further cited in this decision, federal precedent is considered for guidance and
15 to supplement state law when applicable.
16
17

18 Concerning the allegation of some form age discrimination it is clear on the face of the
19 complaint as well as in the supporting information submitted by Ms. Montgomery that
20 any such complaint is directed against the employer and not the Association or MEA-
21 MFT. A failure on the part of the Association to process a grievance based on
22 discrimination could form the basis of a fair representation case and vest jurisdiction
23 with the Board, but absent any such allegation that the Association discriminated
24 against Ms. Montgomery on the basis of age the Board lacks jurisdiction over the
25 remaining age related portion of the complaint.
26
27

28 Procedural issues disposed of, the facts of this case show that Ms. Montgomery was a
29 first year, non-tenured teacher in the District.
30

31 In addressing the contention that the Association failed to enforce the cba by allowing
32 the District to ignore timelines the information submitted reflects that on April 16, 2008,
33 Claudia Morley, Assistant Principal at Helena High School conducted an evaluation of
34 Ms. Montgomery. Also present in the evaluation was Marvin Williams, Director of
35 Special Services. The written evaluation provided to Ms. Montgomery contained 4
36 “meets or exceeds standards” and one “unsatisfactory performance”. It also contained
37 a list of seven suggestions for improvement, a closing comments section, and language
38 in bold noting “You may add comments if you wish. Please return the signed evaluation
39 within five days. You will receive a copy. A copy plus your elective comments will be
40 placed in the District Personnel File”.
41
42

43 Ms. Montgomery signed the evaluation sheet on April 16, 2008, and apparently did not
44 submit comments at that point. Although she contends to the contrary, the investigator
45 has received information from the District indicating that at some point in time Ms.
46 Montgomery did submit comments to the evaluation. These comments were contained
47 in Ms. Montgomery’s personnel file.
48

49 According to Ms. Montgomery, during the evaluation Mr. Williams asked Ms.
50

1 Montgomery whether she would or would not commit to another year for the District.
2 Ms. Montgomery indicated she would. Training was also discussed in the meeting. Ms.
3 Montgomery thus left this meeting believing she had received a positive evaluation and
4 that she would be renewed for the upcoming year. Merely asking someone whether
5 they would or would not commit to another year is, in and of itself, not a promise of
6 continued employment, nor can it be found that Mr. Williams possessed the authority to
7 make any offer of employment to Ms. Montgomery.
8

9
10 On May 5, 2008, Helena High Principal Greg Upham, with Ms. Morley present, advised
11 Ms. Montgomery that the District was going to advertise her position and that she could
12 reapply. In an e-mail of July 16, 2008 to Superintendent Bruce Messenger, Ms.
13 Montgomery states of the May 5, 2008, meeting that she was also advised that
14

15 "her name would be presented to the Helena School Board on the list of teachers
16 not being renewed for 20080 (sic) – 2009 on May 14, 2008".
17

18 Ms. Montgomery further indicates that in the May 5, 2008, meeting Mr. Upham did not
19 state with any specificity why she was not being renewed but that Mr. Upham, according
20 to Ms. Montgomery, indicated the matter was not for debate.
21

22
23 On May 15 and 16 the District interviewed for the position of Special Needs Teacher.
24 The position was filled on May 19. Ms. Montgomery did reapply for the position but was
25 not interviewed.
26

27 On May 13, 2008, the District Trustees met and voted to not renew Ms. Montgomery's
28 contract. That action is captured in written form dated May 14, 2008, from the Board to
29 Ms. Montgomery. Apparently Ms. Montgomery was absent from school for several days
30 after May 13, 2008, but ultimately the notice was presented to her, in person, on May
31 27, 2008. At that time Ms. Montgomery elected to not sign for receipt of the notice.
32 Nonetheless, the notice was duly served prior to June 1, 2008.
33

34
35 On May 13, 2008, at 11:08 a.m. Colleen Hansen, a HEA building representative and
36 member of the CMC, sent an e-mail to Greg Upham notifying him:
37

38 This is to inform you that a Helena Education Association (HEA) grievance is
39 being filed for Sue Montgomery due to a "lack of protocol in the Evaluation
40 process". This grievance is effective immediately.
41

42 The note was copied to Ms. Montgomery and Larry Nielsen the HEA President. Later
43 that same day, at 1:17 p.m., Mr. Nielson advised Ms. Hansen, with copy to Ms.
44 Montgomery and others, that "you have no authority to file an HEA grievance on behalf
45 of a member." In fact, for the HEA to file a grievance on behalf of a member approval
46 would first be needed from the CMC. However, Mr. Nielsen further advised in his e-mail
47 that Ms. Montgomery could file a grievance on her own behalf. At 2:13 p.m. that same
48 day Ms. Montgomery e-mailed Mr. Upham, Colleen Hansen and Larry Nielsen parroting
49 Ms. Hansen's earlier "grievance" e-mail.
50

1 The grievance procedure between the District and the HEA provides:

2
3 ARTICLE XV, 15.2, LEVEL ONE – INFORMAL PRINCIPAL/SUPERVISOR

- 4
5 a. The grievant shall, within fifteen (15) days of the teacher's first knowledge of the
6 facts upon which the grievance is based, discuss it with the principal or
7 supervisor with the objective of resolving the matter informally.
8

9
10 LEVEL TWO-FORMAL PRINCIPAL/SUPERVISOR

- 11
12 a. If the grievant is not satisfied with the informal disposition of the grievance, the
13 grievant may file a written grievance with the principal within ten (10) days of the
14 informal meeting. The principal shall have five (5) days in which to make a
15 written response to the grievance. The response shall include the reasons upon
16 which the decision was based.
17
18 b. Within five (5) days of receiving the principal's written decision, the grievant
19 should either file a written appeal to the Superintendent, or the Superintendent's
20 designee or notify the principal of the acceptance of the decision.
21

22
23 From what the investigator can garner neither Ms. Montgomery nor the HEA on her
24 behalf initially followed Level One. Ms. Hansen seemingly – and apparently without
25 authority, yet perhaps believing Level One had occurred – appears to have filed at the
26 equivalent of Level Two. Ms. Montgomery seemingly then filed her grievance on the
27 same day believing that Mr. Upham refused to meet informally, or in some manner was
28 avoiding a meeting. It is entirely possible that Mr. Upham did not respond to the May
29 13, "grievance" as he knew Level One had not yet occurred. Supportive of this
30 supposition, in her August 10, 2008, memorandum to school board members Ms.
31 Montgomery states in part,
32

33 "When Ms. Montgomery tried to schedule a meeting to begin the grievance at
34 Level One, Mr. Upham was not available due to meetings outside of the
35 building". (It is unknown why this document, as well as other documents
36 submitted by Ms. Montgomery, are not in the first person.)
37
38

39 It is only at Level Two that the cba contemplates a "written grievance", again lending
40 support that the e-mail was viewed as a Level Two action. In short, in the view of the
41 investigator it is hardly clear that the informal process of Level One was initially
42 followed, yet the mandatory language of the process requires informal action before the
43 formal level is pursued.
44

45 What did appear to happen is that at some time or times between May 13 and June 4,
46 discussions involving Ms. Montgomery, JC Weingartner and/or HEA representatives,
47 Bill Rasor, District Personnel Service Administrator, and/or Mr. Williams and/or Mr.
48 Upham did occur sufficiently to have satisfied the Level One requirements of the cba.
49 Ms. Hansen and Ms. Montgomery, met with Principal Upham and Ms. Morley on June 4,
50

1 2008. By this point in time the District clearly knew there was an issue, received further
2 information from Ms. Montgomery – apparently done at the instruction of HEA personnel
3 and/or District personnel – and the District responded at what it understandably
4 believed to be the informal level. Evidence of this is found in Mr. Upham’s letter to Ms.
5 Montgomery of June 5, 2008, stating “I have reviewed your written documentation
6 regarding your **informal grievance** (emphasis added) request and have found no
7 violation of the HEA contract”.

9
10 Of special note, on December 5, 2008, Ms. Montgomery submitted an e-mail to the
11 investigator summarizing her position on the deadlines in the grievance procedure. That
12 e-mail states:

13
14 “(2) The deadline was missed. Greg Upham, Principal, was not available for a
15 meeting for days, so emails were sent by a HEA representative, and by me so
16 my deadline **to begin the process** (emphasis added) was not lost. I knew the
17 School Board was meeting on May 13, 2008, so I filed the email grievance on
18 May 12, 2008. The Negotiated Agreement in Level One states: The grievant
19 shall, within fifteen (15) days of the teacher’s first knowledge of facts upon which
20 the grievance is based, discuss it with the principal or supervisor with the
21 objective of resolving the matter informally.’ Mr. Upham missed the deadline.
22 The District should forfeit the grievance.”

23
24
25 Yet, in her August 10, 2008, memorandum to the Trustees, Ms. Montgomery states:

26
27 Ms. Montgomery believes the Helena Education Association Grievance process
28 was not followed at Level One. “Level One. a. If the grievant is not satisfied with
29 the informal disposition of the grievance, the grievant may file a written grievance
30 with the principal within ten (10) days of the informal meeting. The principal shall
31 have five (5) days in which to make a written response to the grievance. [Level
32 Two language] The response shall include the reasons upon which the decision
33 was based. Ms. Montgomery sent the email to Mr. Upham on May 13. There were
34 five days to respond; however, there was no response. Mr. Greg Upham’s
35 response dated 5 June 2008 does not provide reasons upon which the decision
36 was based. The crux of the issue is (1) the grievance process was not followed
37 on Level One, (2) that an invalid evaluation required a new evaluation . . .

38
39
40 In addressing whether or not the Association did or did not properly enforce the cba the
41 basic premise of Ms. Montgomery is that May 13 (sometimes referred to as May 12,
42 2008, by Ms. Montgomery) is the triggering date that began the grievance process –
43 although it is not clear to which level she is referring. She holds to that position and
44 refers to the subsequent grievance processing as being done under protest so as to
45 maintain her position on her belief the District failed to follow the grievance timelines.
46 To sustain the charge of Ms. Montgomery on this portion of her complaint simply is not
47 warranted given the way events transpired. Just trying to piece this together has been a
48 struggle for the investigator given what has been presented. However, there is no
49 evidence the Association shirked its duties. Rather, confusion, or perhaps lack of
50

1 clarity, on the part of several parties was at the root of the way Ms. Montgomery's
2 "grievance" was initially handled. To be certain, bypassing a meeting with Principal
3 Upham because he "was not available due to meetings outside of the building"
4 exacerbated the problems. Thus, on the one hand Ms. Montgomery would have the
5 District penalized for not following the informal process, but her rationale is founded in
6 the May 13 letter being both a failure to respond informally while at the same time
7 triggering an obligation to follow the five day requirement of Level Two. There was, and
8 remains, confusion on what portion of the process was in play at any given time until
9 things were clarified on or around June 4, 2008. At that time once the procedural
10 hurdles were crossed and it was **clearly** understood that a grievance at the informal
11 level was in the works the grievance timelines, with extensions when mutually agreed
12 upon, were clearly followed by the District and the Association. Put another way, an
13 informal review is a valid and important step in a grievance procedure, but barring any
14 party to the formal steps because of process issues at the informal level should not
15 occur. To do so is simply contrary to good labor relations and the obvious intention of
16 the parties to solve problems quickly and at ground level. The facts in this particular
17 case demonstrate the need for such a view.
18
19

20 On June 6, 2008, the CMC, determined to continue the grievance at Level Two.
21
22

23 On July 11, 2008, Principal Upham denied the Level Two grievance providing his
24 reasons for the denial.
25

26 On July 21, 2008, Larry Nielsen requested an extension of the grievance timelines. The
27 District agreed to an extension until July 25, 2008.
28

29 Meetings of the CMC ensued during the above period of time. All were attended by Ms.
30 Montgomery and Ms. Hansen as well as other available members of the grievance
31 committee. As seems common in the school world, scheduling to gain maximum
32 attendance was problematic, but there is no indication of lack of effort on the part of the
33 CMC. Additionally the committee wanted to have legal advice and thus Mr. Weingartner
34 was called to attend meetings as well.
35
36

37 In the second meeting, attended by Mr. Weingartner, a tape recording provided by Ms.
38 Montgomery, the quality of which is problematic, contains evidence that the CMC was
39 leaning toward moving the grievance to Level Three. This initial inclination was based
40 on the information available to the committee at that time but it is clear the committee
41 was not firm in that belief. They wanted to assess it further, but by this time a draft
42 Level Three request was in the works. At the third meeting Mr. Weingartner indicates
43 that by that point he had an opportunity to review the matter more thoroughly.
44 Particularly he determined that Principal Upham had notified Ms. Montgomery that her
45 contract was up for non-renewal. Discussion occurred in the meeting on tenured versus
46 non-tenured teachers as well as the evaluation procedures in general. There was also
47 mention of a statute, but no specific reference to the statute, other than it was in Title 20
48 and in the view of Mr. Weingartner the statute was followed. In that regard the statute in
49
50

1 question, most likely was 20-4-206 MCA – Notification of nontenure teacher reelection -
2 - acceptance - - termination.
3

4 The committee took action on the grievance on July 25, 2008, and determined it would
5 not move it to Level Three. On July 29, 2008, Larry Nielsen advised Superintendent
6 Messinger of the decision of the HEA. There is nothing presented to the investigator,
7 including e-mails left with the investigator by Ms. Hansen on December 10, 2008, that
8 supports the contention that in some fashion the HEA was compelled to advance the
9 grievance beyond Level Two once the CMC decided to end the grievance at that point.
10

11
12 Subsequent e-mail exchanges involving Ms. Hansen, Mr. Nielsen and Ms. Montgomery
13 occurred, all of which explained further avenues of appeal both within the HEA and to
14 the District. Some of these e-mails involved determining which statute may have been
15 referenced by Mr. Weingartner, but no statute was specifically determined other than
16 20-4-206 MCA as well as 20-4-207 MCA also referenced by Ms. Hansen. Also
17 discussed in these e-mail exchanges was the need to know the appropriate statute, on
18 the part of Ms. Hansen and Ms. Montgomery, in order to bring a matter before the
19 Board of Trustees, but from what can be determined by the investigator no such
20 requirement existed, statutorily or otherwise, and generally speaking there is little if any
21 bar to anyone bringing a matter before a Board of Trustees or any public body for that
22 matter. Not knowing what specific statute may have been referenced, or in what
23 context it was referenced, was not fatal to any appeal that may have been taken. With
24 this, the summary of relevant events pertaining to the processing of the grievance is
25 complete for purposes of this investigation.
26
27

28 Returning to the evaluation process, the second major thrust of Ms. Montgomery's
29 complaint, at some point in time after May 5, 2008, Ms. Montgomery discussed her
30 previously mentioned May 5, 2008, evaluation with Mr. Nielsen and Mr. Weingartner.
31 According to Mr. Nielsen, Ms. Montgomery requested that a new, and hopefully more
32 favorable evaluation be done. In response to Ms. Montgomery's request the HEA did
33 request another evaluation. The District agreed to the request and on May 23, 2008,
34 Claudia Morley issued another evaluation of Ms. Montgomery. This evaluation differed
35 from the April 16 evaluation in that it no longer contained an unsatisfactory rating. To
36 that extent it could be considered more favorable, although it also included eleven
37 suggestions for improvement. At the least, had Ms. Montgomery allowed future
38 employers to view her District evaluations, this second evaluation did eliminate the
39 unsatisfactory rating found in the first evaluation. Viewed in that light, it is more
40 favorable. Nonetheless, it is this second evaluation that triggers the next area where
41 Ms. Montgomery contends her rights were violated, namely that the District improperly
42 took action to non-renew her contract on May 14, 2008, when they did not have the
43 May 23, 2008, evaluation in hand, violations of ARTICLE XIV, Sections 14.1, 14.2, and
44 14.4 of the cba.
45
46

47 ARTICLE XIV discusses the reasons for evaluation and processes to be followed. Of
48 particular relevance to this complaint 14.2.4b provides in part:
49
50

1 b. Non-Tenured Teachers

2 For non-tenured teachers a written evaluation, including a review of performance
3 based on the "Criteria for Teacher Evaluation," shall be given prior to
4 consideration for contract renewal.
5

6
7 There is no question that an evaluation was done by the District. It was done prior to
8 the decision to non-renew. The fact that the District chose to do a second evaluation is
9 not material for purposes of non-renewal. In actual practice the Trustees, except on
10 rare occasion, do not even review the actual evaluations. For purposes of their function
11 the District Trustees act on recommendations of the Superintendent and for purposes of
12 the law the Trustees can elect non-renewal either with, or without cause. In the case of
13 a non-tenured teacher, given the language of the cba, coupled with the statute, whether
14 an evaluation is "favorable" or otherwise, is not material to the ability of the Trustees to
15 non-renew. The Trustees and the District violated neither the cba nor the law.
16

17 A union violates its duty of fair representation to the employees it represents only if its
18 actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, 386 U.S. 171,190
19 [64 LRRM 2369] (1967). To determine if the duty to fairly represent has been breached
20 each element in the three part standard must be examined, Airline Pilots Ass'n, Int'l v.
21 O'Neill, 499 U.S. 65, 77 [136 LRRM 2721] (1991). The Board of Personnel Appeals has
22 adopted the Vaca standard and in Ford v. University of Montana and Missoula
23 Typographical Union No. 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana
24 Supreme Court in reviewing an unfair labor practice charge brought before the Board
25 held:
26

27
28 In short, the Court has to find that the Union's action was in some way a product
29 of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford
30 disagrees with the decision of the Union [in determining that her grievance was
31 without merit] is not sufficient basis for a finding of breach of the duty of fair
32 representation absent these factors.
33

34
35 Applying the arbitrary prong to the allegations made by Ms. Montgomery there really is
36 nothing arbitrary in what the HEA did or did not do. As in Ford, Ms. Montgomery
37 obviously disagrees with the decision of the Association to not advance the grievance
38 beyond Level Two. She also disagrees with the way the Association interprets the cba
39 in terms of grievance timelines. There is nothing before the investigator which indicates
40 the Association was arbitrary in its actions. Given the facts it was not unreasonable for
41 the Association, and the employer for that matter, to conclude that the informal
42 grievance did not actually begin until on or about June 4. Prior to that date there really
43 was no reason to assume that the informal process was invoked. Moreover, nothing
44 reviewed by the investigator, including the tapes, indicates that the Association did not
45 hear the arguments of Ms. Montgomery and Ms. Hansen and then take the appropriate
46 steps to address those concerns. Most importantly, the Association did recognize that
47 an evaluation was done of Ms. Montgomery – all that was required in the contract. The
48 fact there was a second, or as Ms. Montgomery refers to it, a new evaluation, does not
49 negate that fact that an evaluation was done, nor does it mean that the process of non-
50

1 renewal had to begin anew in some fashion. That simply is not supported in the cba or
2 as per 20-4-206 (3) MCA which provides:

3
4 Subject to the June 1 notice requirements in this section, [a date met by the
5 trustees] the trustees may nonrenew the employment of a nontenure teacher at
6 the conclusion of the school fiscal year with or without cause.
7

8
9 The HEA was not arbitrary in the action it took. It afforded an opportunity to be heard
10 and, quoting O'Neill, 499 U.S. at 78, inquiries into such decisions [as made by the
11 exclusive bargaining agent] and whether they are arbitrary or not are not made unless
12 they "are so far outside a wide range of reasonableness, that the actions rise to the
13 level of irrational and arbitrary conduct". Such is not the case given the manner in
14 which Ms. Montgomery's grievance was handled. Was it done perfectly? No. Was
15 what was done reasonable? Yes.
16

17 The second prong of the test for fair representation is discrimination. Here, and as
18 previously indicated, there is no allegation that the Association discriminated against
19 Ms. Montgomery. That prong of the test is met.
20

21
22 In terms of the third prong of the test, bad faith, much of Ms. Montgomery's complaint
23 centers around her perception of the way she was treated in the CMC meetings. There
24 was disagreement in these meetings and spirited discussion as well, and they did
25 evolve as more and more information was presented and discussed. Although the
26 timing of meetings may have been frustrating, that is the nature of trying to conduct
27 business in a school in the summer months, but always, the good-faith conduct of a
28 union is preserved unless it can be demonstrated that the conduct is sufficiently outside
29 a "wide range of reasonableness" so as to be considered irrational. To establish a lack
30 of good faith there must be evidence of fraud, deceitful action, or dishonest conduct by
31 the union, Schmidt v. Electrical Workers (IBEW) Local 949, 980 F.2d 1167, 141 LRRM
32 3004 (8th Cir. 1992) and Aguinaga v. Food & Commercial Workers, 993 F.2d 1167, 143
33 LRRM 2400 (10th Cir 1993) Cert. Denied 510 U.S. 1072, 145 LRRM 2320 (1994). And,
34 as the Ninth Circuit held, there is a mandated deferential standard of review in
35 evaluating union actions and they can be challenged successfully only if wholly irrational
36 and even "unwise" or "unconsidered" union decisions will not rise to the level of
37 irrational conduct, Stevens v. Moore Bus. Forms, 18 F3d. 1443, 145 LRRM 2668 (9th
38 Cir. 1994). Here there is no evidence of bad faith on the part of the HEA.
39
40

41 Turning to the conduct of the District and whether it committed an unfair labor practice,
42 the argument offered by the District is directly on point. Ms. Montgomery fails to cite
43 any statutory violation by the District. There are no allegations by Ms. Montgomery of
44 anti-union animus on the part of the District, nor for that matter did the investigator
45 perceive of any such animus on the part of the District. There is no basis for any finding
46 that the District failed to follow the cba or in some fashion took any action that deprived
47 Ms. Montgomery of her rights guaranteed under the collective bargaining statutes or the
48 cba.
49
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4 **III. Recommended Order**
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6 It is hereby recommended that Unfair Labor Practice Charge 4-2009 be dismissed as
7 against the captioned parties as well as all persons named individually in the original
8 complaint.
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10
11
12 DATED this 10th day of December 2008.
13
14

15 BOARD OF PERSONNEL APPEALS
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17

18 By: _____
19 John Andrew
20 Investigator
21
22
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24

25 NOTICE
26

27 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
28 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
29 may be appealed to the Board. The appeal must be in writing and must be made within
30 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
31 Board at P.O. Box 6518, Helena, MT 59604-6518. If an appeal is not filed the decision
32 to dismiss becomes a final order of the Board.
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CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy
of this document was mailed to the following on the _____ day of December 2008,
postage paid and addressed as follows:

SUSAN MONTGOMERY
PO BOX 1643
BROWNING MT 59417

SUSAN MONTGOMERY
4410 SOUTH 7TH WEST
MISSOULA MT 59804

RICHARD LARSON
ATTORNEY AT LAW
PO BOX 1152
HELENA MT 59624 1152

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